IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

JUDGE'S ORDER NO.128 OF 2005

IN

SUMMARY SUIT NO.1569 OF 2003

Shri Pradip H.Sanghrajka ...Plaintiff

Versus

M/s.Bharti Enterprise & Ors. ...Defendants

.....

Mr.P.V.Shah for Plaintiff.

None for Defendants.

.....

CORAM: A.M.KHANWILKAR, J.

SEPTEMBER 26, 2005.

P.C.

1. Heard Counsel for the Plaintiff. By this Application, the Plaintiff seeks to set-aside order passed by the Prothonotary and Senior Master of this Court dated 31st March 2003, which, in turn, has effect of rejection of the Plaint in Suit No.1569 of 2003; and for restoration of the said Plaint with liberty to the Plaintiff to remove

office objections therein.

2. According to the Office, such relief cannot be pressed into service in the form of Judge's Order. Judge's order essentially is in respect of matters, which do not prejudice the rights of the parties. This approach is adopted by the Office relying on the unreported decision of Justice Smt.K.K.Baam dated 7th August 2002 in **Suit No.3541 of 1988 in the case of Mrs.Queenie Rebecca Bunmallo Wd/o. Norman Edward Fredrick & Anr. vs. Johnson Rock Menezes & Anr.**

3. To get over this position, Counsel for the Plaintiff contends that the order that the Plaintiff seeks from this Court will have to be passed in exercise of discretionary powers under Section 149 and 151 of the Code of Civil Procedure, 1908. Reliance is placed on the decision of Rajasthan High Court and Allahabad High Court reported in **AIR 1975 Rajasthan 150 in the case of Gulam Abbas v. Shri Kalyan Finance Co., Ajmer and Others** and **AIR 1995 Allahabd 225 in the case of M/s.Narain Agricultural Corporation and Others vs.**

Allahabad Bank.

4. In the case of **Gulam Abbas (supra)**, the Plaint was rejected for non-payment of deficient court fee in time. The Rajasthan High Court took the view that where the Court exercises the discretion under Section 149 of Code of Civil Procedure in favour of a party, it does not thereby deprive the other party of any of the vested rights, for which reason, giving notice to the other side is not necessary. The Allahabad High Court, while dealing with similar issue on rejection of Plaint for non-payment of court fee, following the Rajasthan High Court, held that notice to Defendant for exercising discretion in favour of the Plaintiff in such a situation was unnecessary. Relying on the above decisions, Counsel for the Plaintiff contends that Judge's Order is the appropriate remedy.

5. In my opinion, however, the office objection that Judge's order is not maintainable, will have to be upheld. This is so, because rejection of a Plaint results in passing of decree

within the meaning of provisions of the Code of Civil Procedure. The Plaintiff in such a situation, can have two remedies. One remedy of approaching the Trial Court and the other, by way of an appeal. In the event, the Plaintiff was to take recourse to remedy of appeal, it is incomprehensible that the Appeal can proceed on merits, without giving notice to the other side. If that is the only course available to the Appellate Court, I see no propriety in not giving notice to Defendants even for invoking the discretionary remedy in favour of the Plaintiff, where the Court exercises the discretionary power under Section 149 or 151, as the case may be.

6. Viewed in this perspective, the Plaintiff is obliged to serve the Defendants for seeking relief of setting aside order passed by the Prothonotary and Senior Master of this Court dated 31st March 2003, which has the effect of rejection of the Plaint in the above numbered Suit. For the reasons already recorded, the aforesaid decisions pressed into service to contend that no notice to the Defendants is necessary for setting-aside order

of rejection of Plaint are of no avail.

7. Once it is held that some right is created in favour of the Defendants on account of order of rejection of Plaint, for which reason, issuance of notice to Defendants in proposed proceedings for setting aside the order of rejection of Plaint becomes necessary, it would necessarily follow, relying on the exposition in the unreported decision of this Court in **Mrs.Queenie Rebecca Bunmallo's case (supra)**, that Judge's Order for such relief is unavailable. The only course in such a situation is to permit the Plaintiff to convert this Judge's Order into Chamber Summons, so that, the same can proceed on merits, as the delay in taking out the present proceedings appears to be around over two years.

8. Accordingly, Office is directed to convert this Judge's Order into Chamber Summons, which is made returnable on 18th October 2005.

9. Plaintiff shall serve the Defendants before the returnable date. Plaintiff to carry out

necessary amendment on or before 28th September 2005.

A.M.KHANWILKAR, J.